ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2019
CONSOLIDATED CASE NOS. 18-1150 & 18-1164

IN THE

United States Court of Appeals for the District of Columbia Circuit

TEMPLE UNIVERSITY HOSPITAL, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

and

TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS,
Intervenor for Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT

FINAL OPENING BRIEF OF PETITIONER/CROSS-RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioner and Cross-Respondent Temple University Hospital, Inc. ("TUH") certifies as follows:

A. Parties and Amici

1. The parties before the National Labor Relations Board ("NLRB" or "Board") in NLRB Case No. 04-CA-174336 were (i) the Office of the General Counsel of the NLRB; (ii) TUH, the Charged Party; and (iii) Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals ("PASNAP"), the Charging Party.

2. The parties in the underlying Representation Case, NLRB Case No. 04-RC-162716, were (i) TUH and (ii) PASNAP. The American Federation of Labor and Congress of Industrial Organizations filed an *amicus curiae* brief in the Representation Case in support of PASNAP.

3. The parties before this Court are (i) Petitioner and Cross-Respondent TUH; (ii) Respondent and Cross-Petitioner NLRB; and (iii) Intervenor for Respondent PASNAP. No *amici curiae* have joined this action.

B. Rulings Under Review

TUH petitions for review of the following rulings:

1. The NLRB's May 11, 2018 Decision and Order in NLRB Case No. 04-CA-174336, which was reported at 366 N.L.R.B. No. 88 ("Final Order"). [JA54-57.]

2. The NLRB's December 29, 2016 Order Granting Review in Part and Invitation to File Briefs in NLRB Case No. 04-RC-162716, which was unreported (available at 2016 WL 7495062) ("RFR Order"). [JA44-45.]

3. The NLRB's December 12, 2017 Decision on Review and Order in NLRB Case No. 04-RC-162716, which was unreported (available at 2017 WL 6379903) ("DRO"). [JA46-53.]

C. Related Cases

The Board filed a cross-application for enforcement of the Final Order on June 13, 2018, which was assigned case number 18-1164 by this Court. On June 18, 2018, this Court consolidated Case No. 18-1164 with Case No. 18-1150, which is the case number assigned to TUH's petition for review.

TUH is not aware of any other related cases. The proceedings under review have not previously come before this Court or any other court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner and Cross-Respondent Temple University Hospital, Inc. is a non-profit corporation whose sole member is Temple University Health System, Inc. Temple University—Of The Commonwealth System of Higher Education is the sole member of Temple University Health System, Inc.

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Chief Executive Officer (CEO)

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JURISDICTIONAL STATEMENT

On May 30, 2018, TUH filed a timely petition for review of the Final Order issued by the Board on May 11, 2018 in NLRB Case No. 04-CA-174336. The NLRB subsequently filed a cross-application for enforcement. The NLRA does not impose time limits for filing petitions for review or applications for enforcement. This Court has jurisdiction over this test-of-certification case pursuant to 29 U.S.C. § 160(e)-(f).

STATEMENT OF ISSUES

1. Whether the Board erred in finding that PASNAP was not judicially estopped from bringing the Petition.
2. Whether the Board erred in extending comity to TAP, a unit certified by the PLRB in 2006.
3. Whether the Board erred in finding that TUH is not an exempt political subdivision under Section 2(2) of the NLRA. 29 U.S.C. § 152(2).
4. Whether the Board's refusal to decline jurisdiction over TUH was arbitrary, an abuse of discretion, or otherwise contrary to law.
5. Whether the Board erred in finding that TUH violated Section 8(a)(5) and (1) of the NLRA by refusing to recognize and bargain with PASNAP following its certification in the Representation Case. § 158(a)(5), (a)(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth verbatim in an Addendum at the end of this Opening Brief pursuant to Circuit Rule 28(C)(5).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Temple University

History. TU is one of four universities designated as state-related and instrumentalities of the Commonwealth. JA220, ¶10. TU was originally chartered by the General Assembly in 1888 as Temple College of Philadelphia. *See* 24 P.S. § 2510-2(1) ("[T]he Temple College of Philadelphia was created a corporation with perpetual existence under the laws of the Commonwealth . . . under an act of the General Assembly . . . entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, 1874, . . . and its charter approved by the Court of Common Pleas No. 1 for the County of Philadelphia, of March Term, 1888, No. 346, on the twelfth day of May, 1888."). TU's charter has been amended to reflect acquisitions—including TU's acquisition of what is now TUH in 1910—and the change of its name to Temple University – Of The Commonwealth System of Higher Education. *Id.* § 2510-2; JA1443; JA1472-73; JA1528-31; JA217, ¶1. These changes were made by the General Assembly, or in the Court of Common Pleas as directed by the General Assembly. 24 P.S. § 2510-2.

In 1965, the General Assembly passed the TU Commonwealth Act, recognizing TU as an "instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education." *Id.* The TU Commonwealth Act declares that "[t]he Commonwealth of Pennsylvania recognizes [TU] as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and [TU] for the purpose of improving and strengthening higher education by designating [TU] as a State-related university." *Id.* § 2510-2(7).

Governance. The Commonwealth established TU's 36-member board of trustees and decreed one-third as "Commonwealth trustees." *Id.* § 2510-4. Four of them are appointed by the Governor, with the advice and consent of two-thirds of the Senate, four are appointed by the President pro tempore of the Senate, and four are appointed by the Speaker of the House of Representatives. *Id.* The Governor of the Commonwealth, the Mayor of Philadelphia, and the Commonwealth's superintendent of the department of public education are designated ex officio members of TU's board. *Id.* A quorum exists with 12 voting members; therefore, Commonwealth Trustees are in a position to control and impact TU's operations without regard to the remaining members of the board. JA1425 at § 5.3.

Only the appointing entity can remove trustees it appoints. JA217, ¶3. Thus, only Commonwealth public officials who appoint trustees may remove them from the board. In addition, if there is a vacancy of a Commonwealth Trustee, only the Commonwealth appointing authority may appoint a new trustee. Although not required by law, some TU trustees are public officials themselves. JA82 at 89; JA1543-45.

Commonwealth involvement in development. The TU Commonwealth Act provides that the "benefits of all Commonwealth or Commonwealth authority programs for capital development and improvement shall be available to [TU] under terms and conditions comparable to those applicable to land grant institutions of higher learning and State colleges." 24 P.S. § 2510-7; JA218, ¶4. One of the ways the Commonwealth is involved in TU's finances is through its ownership of, and contribution to, real property operated by TU. The Commonwealth may acquire land, erect and equip buildings and provide facilities for use by TU. 24 P.S. § 2510-7; JA218, ¶5. The Commonwealth owns nearly half of the property comprising TU's main and health sciences campuses. JA218, ¶6.

Pursuant to this legislative authorization, the Commonwealth has contributed more than $600 million toward construction and renovation of campus facilities, including nearly $500 million since 1995. *Id.* For example, in 2012, the

Commonwealth committed to contribute $140 million of the $190 million cost of construction of the TU library. *Id.* Commonwealth funding for construction projects requires TU to: comply with the Commonwealth's procurement process, have all project plans and specifications approved by the Commonwealth, have contractors follow specific requirements, and report quarterly throughout construction. JA218, ¶7. These same requirements apply to Commonwealth agencies and state-related institutions when the Commonwealth invests in construction projects. 24 P.S. § 2510-7; JA218, ¶7. As an instrumentality of the Commonwealth, TU receives building permits for construction on its campuses from the Commonwealth, rather than the City of Philadelphia. 35 P.S. § 7210-105(b); JA220, ¶8.

Ability to issue tax exempt bonds. The Commonwealth gives TU the power to issue tax-exempt bonds on the same basis as municipalities. 24 P.S. § 2510-9. TU has issued bonds under this authority on several occasions including 2006, 2010, and 2012 for close to ***$1.8 billion***. JA220, ¶9. Private universities do not have this authority. *Id.*

Records open for public inspection. The General Assembly considers TU to be a state-related entity for purposes of the Pennsylvania Right to Know Law, which specifically designates TU as a state-related institution subject to the

provisions of the act. JA222, ¶22; 65 P.S. §67.1501 *et seq.* Private universities are not covered by the Right to Know Law. JA222, ¶22.

State control over budget. TU is required to maintain a separate account for receipt of its annual appropriation from the Commonwealth. JA221, ¶13. Amounts received from the Commonwealth may be used only for the purposes permitted by the Commonwealth. 24 P.S. § 2510-8; JA221, ¶14. TU must report on its use of Commonwealth appropriations to the Auditor General and the General Assembly. 24 P.S. § 2510-8; JA221, ¶12. The most recent appropriation by the Commonwealth at the time of the Petition provided TU with close to ***$150 million***. JA221, ¶12. The appropriations act (P.L. 3194, No. 13A) specifically requires TU to provide full, complete, and accurate information required by the Department of Education or by the leaders of the appropriations committees of the Senate or House of Representatives. *Id.*

Under the appropriations act, TU's expenditures and costs are reviewed by the Auditor General, who can disallow the expenditures. JA221, ¶15. The Auditor General files information about TU's expenditures with the General Assembly. *Id.* The TU Controller annually prepares the statement of appropriations that is periodically audited by the Auditor General. *Id.*; JA1546-60. The appropriations act requires TU to provide audited financial statements to the General Assembly annually within 120 days of June 30th. JA221, ¶16.

Annual reporting. The President of TU must make an annual report of all TU's activities—instructional, administrative and financial—to the Governor and members of the General Assembly. 24 P.S. § 2510-10; JA222, ¶19. Since 1994-1995, the Commonwealth has exercised additional oversight powers under the appropriations act by requiring additional reports from TU on its operations, including significant detail on the number of faculty employed by TU, total number of student credit hours, number of different courses scheduled by level of instruction, enrollment information, all vendor contract information, and how the time of each faculty member is spent. 24 P.S. § 20-2001-D – 2006-D; JA222, ¶19; JA275-327; JA329-1167.

Commonwealth Funding. The total direct funding from the Commonwealth to TU during the two years before the Representation Case was nearly $300 million in addition to the construction funds and the funds provided by the Commonwealth to TUH/TUHS. JA1389-1420. Each September, TU submits an appropriation request that includes a narrative responsive to questions provided by the Commonwealth, as well as some 35 pages of operating budget summary information required by the Commonwealth. JA222, ¶17. The President of TU testifies before the General Assembly in the spring of each year about the appropriations request. JA222, ¶18. In testimony on March 24, 2015, before the Petition was filed, then-TU President Theobald discussed Temple's fulfillment of

the Commonwealth's need to provide education to lower income residents. *Id.*; JA258-62.

Treatment under federal statutes. The federal Tax Reform Act of 1986 recognizes TU as a governmental issuer for federal tax purposes. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1317(24)(B), 100 Stat. 2602, 2699 (1986); JA222, ¶20. Additionally, federal courts have consistently held TU to be a state actor under Section 1983. *See Molthan v. Temple Univ.*, 778 F.2d 955, 961 (3d Cir. 1985) (TU is a state actor under Section 1983); *Krynicky v. Univ. of Pittsburgh/Schier v. Temple Univ.*, 742 F.2d 94, 103 (3d Cir. 1984) (same); *Frazer v. Temple Univ.*, 25 F. Supp. 3d 598, 607 (E.D. Pa. 2014) ("For purposes of Section 1983, it is undisputed that Temple is ***a municipal subdivision.***") (emphasis added); *Isaacs v. Bd. of Trustees of Temple Univ.*, 385 F. Supp. 473, 490 (E.D. Pa. 1974) (finding TU's termination of two faculty members to be state action for purposes of Section 1983); *see also Osei v. Temple Univ.*, No. 10-2042, 2011 WL 4549609, *7 (E.D. Pa. Sept. 30, 2011), *aff'd*, 518 Fed. App'x 86 (3d Cir. 2013).

Controls over tuition. TU is required to maintain separate tuition rates for Commonwealth residents and out-of-state students. 24 P.S. § 2510-6. Private universities do not have to maintain separate tuition rates. JA220-21, ¶11.

Treatment under state statutes. TU is also exempt from state tax as a purely public charity. 10 P.S. § 374. Private, non-profit universities do not have this status. JA222, ¶21.

Labor Relations. At the time of the Petition, TU had 11 bargaining units covering approximately 6,000 employees. *See* JA154.

TU's status as an "instrumentality" of the Commonwealth makes it a "public employer" under PERA. *See* 43 P.S. § 1101.301(1); JA222, ¶23. This is not true of private universities in the Commonwealth. The Board issued a decision in 1972 declining to assert jurisdiction over TU because of its "unique relationship" with the Commonwealth. *Temple Univ.*, 194 N.L.R.B. 1160 (1972).

B. Temple University Hospital

History and corporate structure. TU acquired TUH in 1910 with a primary purpose "to support [TU] and its Health Sciences Center academic programs by providing the clinical environment and service to support the highest quality teaching and training programs for health care students and professionals, and to support the highest quality research programs." JA1263. Until 1995, TUH was an unincorporated division of TU. JA79 at 77. TU created TUHS in 1995 as a holding company for TU's health care assets, including TUH. *Id.* at 77-78.

TU is the sole member of TUHS, which is the sole member of TUH. JA1283; JA1365. TU, TUHS, and TUH have interlocking boards with leadership

of TU, including its president and the chair of its board, serving on the boards of TUHS and TU. JA1292; JA82 at 90-92. The TU board of trustees is the sole entity with power to appoint and remove directors of TUHS. JA1284-86. TUHS has the authority to appoint and remove the TUH board of directors. JA83 at 93-94; JA1367-68.

Financial relationship. TU's consolidated financial statements include the revenues and expenses of TUHS, TUH and the other facilities within TUHS. JA1420. TUHS's budget must be approved annually by the TU board, and TUH's budget must be approved annually by the TUHS board. *See* JA1283-84 at § 5.4; JA1365-66 at § 5.4. Due to overlapping services and personnel, TU, TUHS, and TUH allocate more than $100 million to each other annually, but do not bill each other on a fee-for-service basis. JA84 at 98-99; JA97 at 149; JA1330.

Intertwined personnel and operations. TU, TUHS, and TUH are intertwined in many respects with overlapping personnel, interconnected operations, and shared services and infrastructure.

For example, Larry Kaiser, the Dean of TUSM, TU's Senior Executive Vice President of Health Affairs, and TU's highest paid employee, is the CEO of TUHS. JA82 at 92; JA87 at 111-12; JA1736. The physicians who provide patient care at TUH and other TUHS facilities are employees of TU. JA1173, ¶18. They work with nurses and other clinical staff employed by TU, as well as staff employed by

TUH and other TUHS facilities. *Id.* Finance and contracts administration personnel from TU provide services to TUH. *Id.*

TU personnel manage infrastructure projects on TUH facilities (which are owned by TU and the Commonwealth). JA1173, ¶18; JA1176, ¶31; JA152, ¶4. TU police patrol and respond to incidents at TUH, which state law considers part of TU's campus for purposes of TU police jurisdiction. JA1175, ¶22. The maintenance work at TUH is done by TU employees in a bargaining unit that solely services the TU health sciences facilities, including TUH, TUSM, and TU dental school facilities. JA154; JA88-89 at 115-18; JA1173, ¶18. TU also provides TUHS's external internet connectivity and manages and supports TUHS's (including TUH) network. JA1176, ¶36.

Labor Relations. TUHS and TUH can be referred to interchangeably for collective bargaining purposes. JA1175, ¶23. At the time of the Petition, TUH and TUHS had approximately 3,500 unionized employees in 11 bargaining units. *See* JA152-54, ¶5. These bargaining relationships, like TU's relationships with its bargaining units, have always been covered by PERA and subject to the jurisdiction of the PLRB.

C. History of TAP

The Union came to represent TAP after petitioning the PLRB in 2005 for an election in the 1975 Unit, a technical and professional employees unit at TU and

TUH represented by 1199C that had been certified by the PLRB in 1975. *In re Employes of Temple Univ. Health Sys.*, Case No. PERA-R-05-498-E, 39 PPER ¶ 49, 2006 PA PED LEXIS 69, *4, *10 (PLRB Order Directing Submission of Eligibility List, April 21, 2006). 1199C asserted that the PLRB lacked jurisdiction over TUH if, as a then-recent PLRB decision had found, TUH and TU were separate employers for the purposes of collective bargaining. *Id.* at *6.

The PLRB invited briefing on the jurisdiction issue. *Id.* at *10. The Union asserted that the PLRB, rather than the NLRB, had jurisdiction over TUH. JA1202-03. Counsel for the Union, who is counsel for the Union in these proceedings, wrote to the PLRB:

> In suggesting that there is would be [sic] jurisdictional significance to a determination of the PLRB that the University and TUHS are separate employers, the Intervenor [1199C] has ignored one salient point, to wit, that the record adduced at the hearing in this matter, (which incorporates a great deal of the record in Case No. PERA-U-03-318-E) [and on which the Union relies for the factual predicate for its position in the Representation Case] [demonstrates that] TUHS is a wholly owned subsidiary of the University. Indeed, the *University* is the sole member of the TUHS corporation. Given that [1199C] does not appear to contest that the University is indeed a public employer within the meaning of Section 301(1) of PERA, [1199C]'s argument must be fail [sic].

JA1203 (emphasis in original). Relying on the Board's 1972 *Temple University* decision and *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Union concluded, "PASNAP is quite confident that the NLRB would decline jurisdiction over TUHS." *Id.*

The PLRB agreed and ordered an election among the TUH employees from the 1975 Unit. *In re Employes of Temple Univ. Health Sys.*, 2006 PA PED LEXIS 69, *12. PASNAP prevailed in the election and has represented TAP since then. At the time of the Petition, the TAP unit contained approximately 665 employees. JA152-53, ¶5.

Before the Petition, the parties treated their relationship as falling under the PLRB's jurisdiction. PASNAP filed at least 26 ULP complaints with the PLRB alleging violations of PERA. *See* JA155-56, ¶12. The parties collectively bargained in accordance with PERA. JA155, ¶6. Additional classifications were added to TAP by the Union through the PLRB's consent process. JA156-57 (listing unit clarification petitions involving PASNAP since 2005); *PASNAP v. Temple Univ. Health Sys.*, PERA-C-14-259-E, 48 PPER ¶ 54, 2016 PA PED LEXIS 84, *13 (PLRB Proposed Decision & Order, Nov. 30, 2016) (noting four classifications were added to TAP with TUH's agreement in 2014).

In August 2015, Bill Cruice, then-Executive Director of the Union, sent the following message:

> I would like to meet with you for an hour or so fairly soon to discuss the strong possibility that PASNAP will soon take the position that Temple University Hospital is, in fact, subject to the jurisdiction of the NLRB rather than the PLRB…A key part of the context of this move by the union is the coming politically motivated US Supreme Court *Freiderichs* [sic] decision, which will deem unconstitutional agency fee (fair share) provisions for those employers considered "state actors" under the 1st and 14th amendments.

JA1535-37. At the time of the Petition, the Union had a ULP charge pending in front of the PLRB in which it asserted that TUH was a public employer under PERA. *See* JA156. The Union never withdrew that ULP, pursuing the action before the PLRB at the same time that it pursued the Representation Case before the NLRB. *Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84 (finding no unfair labor practice).

II. PROCEDURAL BACKGROUND

A. The Petition and Hearing.

The Union filed the Petition on October 27, 2015, seeking to represent two unrepresented classifications of TUH employees: professional medical interpreters and transplant coordinators. The Regional Director initially dismissed the Petition in November 2015, stating that the purposes of the Act would not be effectuated based on the Board's 1972 *Temple University* decision and the relationship between TU, TUHS, and TUH. The RD then reversed himself, concluding that the NLRB should exercise jurisdiction over TUH, notwithstanding the Board's declination of jurisdiction over TU, and by extension TUH, in 1972.

A hearing was held on December 16-17, 2015. As the Hearing Officer recognized, the Petition sought representation of 11 employees in a stand-alone unit. JA65 at 21 ("[A]s a preliminary matter, the only unit before us are the 11 or so employees and is the only unit that would be certified. The unit that was

certified by the [PLRB], we can't have an *Armour-Globe* addition to a unit that we haven't certified."). The Union orally amended its Petition on January 5, 2016 to request comity to TAP and an *Armour-Globe* self-determination election. TUH repeatedly offered to add the petitioned-for classifications to TAP under the PLRB's procedures, which did not require an election, but the Union refused. *See* JA74 at 58; DRO at 7 [JA52].

B. The RD's Decision.

The RD issued the DDE on January 22, 2016, concluding the Board should exercise jurisdiction over TUH and ordering an election among the 11 employees covered by the Petition. The RD found that the Union was not judicially estopped from bringing the Petition based on its repeated jurisdictional statements to the PLRB. DDE at 11-13 [JA23-25]. The RD determined that TUH was not an exempt political subdivision and policy did not justify declining jurisdiction over TUH. *Id.* at 14-16 [JA26-28]. Finally, the RD concluded that comity should be extended to TAP. *Id.* at 16 [JA28].

C. The Election and TUH's Request for Review.

The Union prevailed in the self-determination election and the certification issued on February 18, 2016. TUH filed a timely RFR with the Board. On December 29, 2016, the Board granted review on two issues: (1) whether the

Board should exercise its discretion to decline jurisdiction over TUH; and (2) whether the Board should extend comity to the TAP unit. RFR Order at 1 [JA44].

The Board denied the RFR in all other respects. *Id.* It found TUH was not exempt as a political subdivision because TUH was neither created directly by the state nor administered by individuals who are responsible to public officials or the general electorate. *Id.* at 2 n.2 [JA45]. The Board also found that the Union was not estopped from bringing the Petition and processing the Petition would not confer an unfair advantage on the Union or impose an unfair detriment on TUH. *Id.*

Member Miscimarra would have granted the RFR in all respects. *Id.*

D. The Board's Decision on Review.

On December 12, 2017, the Board issued its decision affirming the DDE. The Board found it would effectuate the policies of the Act to assert jurisdiction over TUH under *Management Training*, 317 N.L.R.B. 1355 (1995). DRO at 2 [JA47]. The Board found that TUH exercised sufficient control over the employees' terms and conditions to permit meaningful bargaining and that it met the monetary jurisdictional standards. *Id.* While it assumed that TU could be analogized to an exempt political subdivision for the purpose of its analysis under *Management Training*, the Board did not find the existence of any analogous "special circumstances" that would justify declining jurisdiction over TUH. DRO

at 2-3 [JA47-48]. Nor did the Board agree that extending NLRB jurisdiction would destabilize TUH's decades-long bargaining relationship with PASNAP and other unions covering multiple bargaining units, noting that the Board "has repeatedly asserted jurisdiction over bargaining units previously certified by the PLRB." DRO at 2 [JA47].

The Board also extended comity to TAP. The Board found the state certification met its standard under *Doctors Osteopathic Hospital*, 242 N.L.R.B. 447, 448 (1979), that "the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements." DRO at 3 [JA48] (internal quotation marks omitted). The Board also found that TAP was not non-conforming under the Health Care Rule because the Rule allows combinations of the specified units. *Id.* at 4 [JA49]. Alternatively, the Board concluded that TAP qualified as an "existing non-conforming unit" because it remained largely the same as the 1975 certification (albeit under a different bargaining representative). *Id.* The Board also found it did not matter if the PLRB had jurisdiction when it issued the TAP certification in 2006.

Then-Chairman Miscimarra dissented, finding that the Board should decline jurisdiction over TUH. *Id.* at 8 [JA53].

E. Unfair Labor Practice Proceedings.

The Union filed a refusal-to-bargain charge on April 15, 2016 and an amended charge on April 25, 2016, which was held in abeyance while the Board considered TUH's RFR. The General Counsel issued a complaint on January 19, 2018, alleging that TUH violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, and the Board issued the Final Order granting the General Counsel's Motion for Summary Judgment on May 11, 2018. TUH filed its timely petition for review with this Court on May 30, 2018. The General Counsel filed the NLRB's cross-application for enforcement on June 13, 2018.

SUMMARY OF ARGUMENT

I. Judicial Estoppel Precludes the Union from Pursuing the Petition Before the NLRB.

The Petition seeking to have the Board grant comity over the 665-employee TAP unit previously certified by the PLRB and hold an *Armour-Globe* self-determination election to add 11 employees should be dismissed on judicial estoppel grounds because the Union successfully argued to the PLRB in 2006 that the PLRB, rather than the NLRB, had jurisdiction over the same TAP unit the Union now seeks to bring under the NLRB. In the intervening decade, the Union consistently and repeatedly invoked the jurisdiction of the PLRB in more than two dozen cases, including an unfair labor practice case which PASNAP pursued in

front of the PLRB even as it was seeking to have the NLRB take jurisdiction over the unit. TUH had a right to, and did, rely on PASNAP's consistent assertions of the PLRB's jurisdiction which it now admittedly seeks to abandon so that it can violate its members' First Amendment rights. Judicial estoppel exists to prevent litigants from using judicial forums to have their cake and eat it too.

The Board's decision applied the wrong legal principle, confusing judicial estoppel with collateral estoppel, and relied on factual findings unsupported by substantial evidence in the record or which otherwise mischaracterize the relevant factors for judicial estoppel under *New Hampshire v. Maine*, 532 U.S. 742 (2001).

II. Extending Comity to TAP Violates the Health Care Rule and Board Precedent.

The Board's grant of comity to TAP is contrary to the law and the facts. First, the Board's finding that the unit is not non-conforming under the Health Care Rule because it combines two of the eight permitted units is contradicted by the record, which shows the unit does not encompass all of TUH's technical and professional employees, and is also inconsistent with the Union's admission and the RD's finding of non-conformity. Similarly, the Board's alternative claim that TAP is an "existing non-conforming unit" under the Health Care Rule fails because substantial evidence shows TAP is different than the 1975 Unit in terms of scope, employer, and bargaining representative. Classifications were also added to

TAP after PASNAP became the bargaining representative in 2006, further changing the scope of the bargaining unit.

Moreover, if TUH were an employer under the Act, which TUH disputes for the reasons set forth below, the grant of comity is contrary to Board law and repugnant to the Act because the 2006 unit did not confirm with the Health Care Rule when certified. In addition, granting comity would violate *Summer's Living Systems, Inc.*, 332 N.L.R.B. 275 (2000), as the PLRB would have lacked jurisdiction at the time of the certification if it lacks jurisdiction now.

III. TUH Is a Political Subdivision Exempt from the Jurisdiction of the Act.

The Board's finding that TUH is not a political subdivision under Section 2(2) ignored the substantial evidence on the record as a whole, which establishes that TUH's relationship with TU makes it an exempt political subdivision under the factors set forth in *Hawkins*. The record also establishes that TUH is not covered by the Act on the same basis as the wholly-owned subsidiaries of the political subdivision in *Northern Diagnostic Services, Inc.*, G. C. Advice Memo., Case No. 18-CA-60338, 2011 WL 6960025 (2011).

IV. The Board's Assertion of Jurisdiction Over TUH was Arbitrary.

The Board's assertion of jurisdiction over TUH was arbitrary and not consistent with the policy of the Act. The Board treated TUH differently than TU despite the close relationship between the two entities. The Board also applied

Management Training without acknowledging the long bargaining history between these parties under state law sets them apart from the situation contemplated by *Management Training*. The Board also failed to properly consider the massive effects NLRB jurisdiction could have on other TUH bargaining units that would be affected by this decision. Nor did the Board consider that TUH was willing to add the petitioned-for employees to the existing TAP unit using PLRB procedures, making assertion of jurisdiction unnecessary to protect the interests of either the employees or the Union. Finally, the Board ignored that the sole and admitted purpose of the Petition was to violate the First Amendment rights of covered employees by circumventing the anticipated Supreme Court decision on compulsory union fees.

STANDING

TUH has standing to seek review in this Court as an aggrieved party to a final order of the Board under 29 U.S.C. § 160(f). *See Retail Clerks Local 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

STANDARD OF REVIEW

An agency's order can only be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Erie Brush v. NLRB*, 700 F.3d 17 (D.C. Cir. 2012) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) and *SEC v. Chenery*, 332 U.S. 194, 196 (1947)).

The Board's factual findings will be upheld only "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. §§ 160(e), (f). "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted). As this Court has stated, "[w]here the record evidence is in conflict, the substantial evidence test requires the Board to take account of contradictory evidence, and to explain why it rejected evidence that is contrary to its finding." *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 809 (D.C. Cir. 2007) (internal quotation marks omitted).

Additionally, this Court will set aside a Board decision "when it has no reasonable basis in law, fails to apply the proper legal standards, or departs from established precedent without reasoned justification." *Jochims v. NLRB*, 480 F.3d 1161, 1167 (D.C. Cir. 2007) (citing *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004)). Nor will it enforce an order if the Board acted arbitrarily or otherwise erred in applying established law. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011); *see also DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016) (no deference warranted "where the Board fails to adequately explain its reasoning, where the Board leaves critical gaps in its reasoning or where the Board erred in applying the law to the facts").

"A reviewing court will not disturb the Board's discretionary decision to assert its jurisdiction 'absent a showing that [the Board] acted unfairly and caused substantial prejudice to the affected employer.'" *Human Dev. Ass'n v. NLRB*, 937 F.2d 657, 661 (D.C. Cir. 1991). "The Board nevertheless is 'bound by its own rules until it changes them, including the rules that it has adopted in order to channel what would otherwise be an essentially unreviewable discretion in the deployment of its limited prosecutorial resources.'" *Id.* As this Court has noted, "While, of course, the Board has broad discretion to determine when a jurisdictional exercise will serve the objectives of the Act, its power is not unlimited, and is never to be used dogmatically." *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 (D.C. Cir. 1969). Thus, the Board cannot "act arbitrarily nor can it treat similar situations in dissimilar ways." *Id.* (internal quotation marks omitted) (examining whether the Board's assertion of jurisdiction was so inconsistent with its precedents "as to constitute arbitrary treatment amounting to an abuse of discretion").

ARGUMENT

I. JUDICIAL ESTOPPEL PRECLUDES THE UNION FROM PURSUING THE PETITION BEFORE THE BOARD.

The Board erred in finding the Union was not estopped from bringing the Petition under the principles of *New Hampshire v. Maine*, 532 U.S. 742 (2001), despite the Union's prior success convincing the PLRB that the Board lacked jurisdiction over TUH. *See* RFR Order at 2 n.2 [JA45].

A. The Board Relied on Inapplicable Legal Principles in Finding Judicial Estoppel Did Not Apply.

Confusing judicial estoppel and collateral estoppel, the RD held judicial estoppel inapplicable because the Board was not a party to the proceedings before the PLRB. *See* DDE at 8, 12 [JA20, JA24]. In *New Hampshire v. Maine*, the United States Supreme Court held that "[u]nder the judicial estoppel doctrine, where a ***party*** assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." 532 U.S. at 742 (emphasis added). Its purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Judicial estoppel is "a doctrine intended to prevent the perversion of the judicial process." *Id.* at 743, 749-50. It is designed to prevent the exact harm presented by the Petition.

"[J]udicial estoppel is a doctrine distinct from the res judicata doctrines of claim and issue preclusion." *New Hampshire*, 532 U.S. at 742-43. Unlike judicial estoppel which applies to the parties and prevents them from taking inconsistent legal positions whenever they deem it appropriate, issue preclusion refers to the effect of a prior judgment in foreclosing successive litigation of an issue or fact previously resolved. *Id.* at 748-50. The impact of issue preclusion—giving full weight to another tribunal's decision—is evident in Board decisions that caution against applying that principle where the Board was not a party to the underlying proceedings. *See, e.g.*, *Field Bridge Assocs.*, 306 N.L.R.B. 322, 323 (1992). However, those concerns are not present with judicial estoppel because the Board is not faced with accepting the determination of another tribunal.

Here, the DDE conflates these distinct legal principles, asserting that "as the Board was not a party to the prior proceeding, it is not precluded from determining jurisdiction" and "[t]he Board as the agency that Congress has chosen to resolve the issue should not be precluded by the resolution of jurisdiction issues by state-court findings." DDE at 12 [JA24]. TUH never asserted that the Board was estopped or precluded from determining jurisdiction because the PLRB found it had jurisdiction over TUH in 2006. Nor did TUH ask the Board to find itself bound by decisions from other tribunals. Rather, TUH asserts that the ***Union*** is precluded from bringing the Petition to bring TUH under the Board's jurisdiction

based on its own prior inconsistent statements. Therefore, decisions cited by the RD discussing the preclusive effect of other tribunal decisions are wholly inapplicable.

Accordingly, the Board's rejection of TUH's judicial estoppel claim is inconsistent with the law and should be set aside.

B. The Board Erred in Concluding the Elements of Judicial Estoppel Are Not Met.

The RD's factual findings, affirmed by the Board, are materially deficient and unsupported by substantial evidence on the record as a whole. The Supreme Court described three common factors of judicial estoppel as follows: 1) the party took the opposite position in prior proceedings; 2) the party was successful in persuading that tribunal of its position; and 3) the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire*, 532 U.S. at 749-51. Each of these factors has been met.

1. The Union Took the Opposite Position in Prior Proceedings.

There is no dispute that the first factor has been met. As the DDE states, "[TUH] is correct that [the Union] argued to the PLRB that the Board did not have jurisdiction, that the PLRB accepted this argument, and that [the Union] currently contends that the Board has jurisdiction over [TUH]." DDE at 12 [JA24]. The Union posed no objection to that finding and it was affirmed by the Board in its RFR Order.

In addition, the Union has invoked the jurisdiction of the PLRB in more than two dozen other cases since 2005, affirmatively asserting that TUH is a public employer within the meaning of PERA. JA155-57, ¶12. Notably, one of those cases was pending at the time the Petition was filed and was pursued by the Union to decision in 2016, even as it claimed before the Board that the NLRB, not the PLRB, had jurisdiction. JA156; *PASNAP v. Temple Univ. Health Sys.*, PERA-C-14-259-E, 48 PPER ¶ 54, 2016 PA PED LEXIS 84 (PLRB Proposed Decision & Order, Nov. 30, 2016) (finding no unfair labor practice).

2. The Union Successfully Persuaded the PLRB of Its Contrary Position.

The Board found that there was "no evidence that the [Union] misled the PLRB" so the second element did not apply. RFR Order at 2 n.2 [JA45]; *see also* DDE at 12 [JA24] (contending facts do not show the PLRB "relied on [the Union's] assertions in a way that would later 'create the perception that either the first or the second court was misled'"). That conclusion is contrary to the law and the facts.

The second factor only requires that the party's original position be accepted by the tribunal, which admittedly occurred here, because that acceptance necessarily creates a perception of one tribunal being misled when the party later reverses its position. *See New Hampshire*, 532 U.S. at 750 ("[C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's

earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'"); *see also Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010) ("'[J]udicial acceptance of an inconsistent position in a later proceeding . . . create[s] the perception that either the first or the second court was misled,' thus posing a threat to judicial integrity."). Therefore, the second element has been satisfied and the Board's conclusion to the contrary was erroneous.

Even if more were required to create the impression that a tribunal was misled, there is ample evidence in this case. The Union either successfully misled the PLRB in 2006 and thereafter up to and including the issuance of the PLRB's 2016 decision, or successfully misled the NLRB in the Representation Case because its contrary positions cannot be reconciled. Not only did the Union successfully argue to the PLRB that TUHS was a wholly-owned subsidiary of TU and that the Union was "quite confident that the NLRB would decline jurisdiction over TUHS," the Union continued to affirmatively represent to the PLRB that it had jurisdiction over TUH for a decade after the election. *See* JA1203; JA155-57, ¶12 (stipulating that the Union filed at last 26 cases with the PLRB since 2006 in which it affirmatively represented that the PLRB has proper jurisdiction over TUH, TUHS, or TU). During the hearing in the Representation Case, the Union continued to pursue an unfair labor practice case before the PLRB even while

simultaneously arguing that jurisdiction properly resided with the NLRB. JA156; *see Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84. This is exactly the kind of legal gamesmanship that judicial estoppel is intended to prevent.

Just as troubling is the Union's announced motivation for invoking the NLRB's jurisdiction—an attempt to avoid the expected Supreme Court decision invalidating mandatory agency fees for public sector employees and, therefore, to infringe on the constitutional rights of the employees it represents.[1] This further establishes an impression that tribunals were misled or manipulated by the Union.

The Board's conclusion that there was "an inadequate basis to believe the PLRB would have reached a different result had the [Union] taken some contrary position before the PLRB" is also baseless. RFR Order at 2 n.2 [JA45]; *see* DDE at 12 [JA24] ("[T]here is no reason to believe that the PLRB would have made a different determination had [the Union] made a contrary argument"). First, the Board imposes a standard not reflected in *New Hampshire v. Maine*. Second, this finding directly conflicts with the RD's earlier finding that the PLRB accepted the Union's 2006 argument that the NLRB lacked jurisdiction. DDE at 12 [JA24] (noting that the Union "argued to the PLRB that the Board did not have jurisdiction, [and] ***that the PLRB accepted this argument***") (emphasis added).

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[1] The Union's feared result in *Friedrichs v. California Teachers Ass'n*, 135 S. Ct. 2933 (2015), became a reality with the Supreme Court's decision in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).

This conclusion is also belied by the PLRB's actions, specifically asking the parties to brief the jurisdiction issue and noting the Union's submission in its opinion. *See In re Employes of Temple Univ. Health Sys.*, Case No. PERA-R-05-498-E, 39 PPER ¶ 49, 2006 PA PED LEXIS 69, *10 n.7 (PLRB Order Directing Submission of Eligibility List, April 21, 2006). Moreover, reason suggests that the PLRB would have reached a different conclusion if PASNAP had agreed the NLRA applied because then both the current and petitioning unions would have been objecting to the PLRB's jurisdiction. In short, there is no legal or factual basis for the Board's speculative finding on this point and the second element of judicial estoppel has been met.

3. The Union Derived an Unfair Advantage from Its Actions to the Detriment of TUH.

The Board found that "processing the petition will not confer an unfair advantage on the [Union] or impose an unfair detriment on [TUH]." RFR Order at 2 n.2 [JA45]. The RD decision, on which the Board relied, found that TUH's inability to make use of certain legal remedies available under the Act due to the Union's assertion of PLRB jurisdiction was not, "[i]n [his] view, . . . the type of detriment or advantage about which the Supreme Court was concerned in *New Hampshire v. Maine*." DDE at 12 [JA24]. Contrary to these findings, the record establishes that allowing the Petition would provide the Union with an unfair advantage and impose an unfair detriment on TUH.

The Board ignored the fact that TUH has continuously relied on the Union's position that the PLRB, not the NLRB, has jurisdiction over TUH employees. For example, when the parties reached impasse during collective bargaining negotiations in 2009, TUH made a last best offer to the Union. JA95 at 142. Yet, for months, TUH was unable to impose contract terms on the Union based on the state of the law under PERA, which prohibits implementation at impasse in the absence of a work stoppage by employees. *See* JA95 at 142-44. If the parties were under the jurisdiction of the NLRB, TUH would have been entitled to impose its last best offer and a 30-day strike might have been avoided. *See id.* Moreover, the Union has repeatedly asserted that it had no obligation to provide the strike notice TUH would be entitled to under the Act. 29 U.S.C. § 158(g). For example, Bill Cruice, then-Executive Director of the Union, wrote to TUHS, "As you know, unlike the National Labor Relations Act, Pennsylvania's PERA contains no legal requirement that the nurses provide this 10-day notice." JA1533. The Board's unsupported assertion that "this is not the type of detriment or advantage about which the Supreme Court was concerned" erroneously belittles the significance of these actions to the thousands of employees at issue and has no basis in the law.

In addition, the Board ignored the Union's extensive history of invoking the jurisdiction of the PLRB and the Pennsylvania courts, which is itself a detriment. The Union filed at least 26 actions with the PLRB against TU/TUH/TUHS in the

10 years preceding the Petition, repeatedly asserting that these entities were public employers. JA155-57, ¶12. Additionally, the Union treated TUH and TUHS as public employers before Commonwealth state courts for purposes of the exercise of the courts' jurisdiction in multiple cases. *Id.* In 2014, the Union went to the PLRB, not the NLRB, to add similar positions to TAP. *See Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84, *13 (discussing addition of classifications in 2014). By agreement, under the procedures set forth in PERA, several of those positions were added without a hearing and without an election, which would not have been permitted under the NLRA. *Id.* Having benefited from the jurisdiction of the PLRB on each of these instances, the Union's assertion that the NLRB, not the PLRB, has jurisdiction is itself sufficient to show unfair advantage. Moreover, the Board disregarded the Union's forum shopping by allowing the Union to keep its then-pending ULP case against TUH/TUHS active before the PLRB while simultaneously pursuing the Petition through the NLRB's processes.

In sum, the Union is playing both sides, based on what is favorable to its position of the moment. This manipulation of the legal system is precisely what the Supreme Court was concerned with in *New Hampshire v. Maine*. It is also inconsistent with the Board's policies. *See We Transport, Inc.*, 198 N.L.R.B. 949 (1972) ("[W]e would not be inclined to encourage forum shopping by permitting

parties who have already initiated a proceeding before a state agency subsequently to institute a like proceeding in the same matter before our agency").

Accordingly, the Board's decision not to apply judicial estoppel is legally erroneous and contradicted by the record.

II. EXTENDING COMITY TO TAP VIOLATES THE HEALTH CARE RULE AND BOARD PRECEDENT.

The Board may grant comity to state certifications that were issued prior to the Board's Health Care Amendments, which extended coverage to private, non-profit hospitals in 1974 (e.g., existing non-conforming units), and/or certifications that were valid at the time of their issuance. *See, e.g.*, *Summer's Living Systems, Inc.*, 332 N.L.R.B. 275 (2002) (declining to extend comity to state elections that occurred during time the Board had jurisdiction); *Taylor Hosp.*, 249 N.L.R.B. 137 (1980) (granting comity over PLRB decision that was issued prior to Health Care Amendments). Here, neither of those criteria exist. As a result, the Board's decision to extend comity to the PLRB-certified unit is unsupported by substantial evidence and arbitrarily departs from Board precedent.

A. The Record Does Not Support the Board's Finding That TAP Complies with the Health Care Rule.

1. The TAP Unit Is Non-Conforming.

The Board's finding that the TAP unit is not non-conforming because it combines two of the eight types of units specified in the Health Care Rule is not supported by substantial evidence. *See* DRO at 4 [JA49]. The Health Care Rule

allows unions to pursue bargaining units in acute care hospitals that are combinations of the eight specific types of units listed in the Rule. *See* 29 C.F.R. § 103.30(a); *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1184 (D.C. Cir. 2012) (finding union properly sought to combine six of the eight groups).

While the Board describes TAP as "a combined unit of all professional and technical employees," that conclusion has no evidence in the record. DRO at 4 [JA49]; § 103.30(a)(3),(4). To the contrary, the very existence of the Petition is evidence that the existing unit does not encompass all employees in those categories as defined in the Health Care Rule (i.e., "[a]ll professionals except for registered nurses and physicians" and "[a]ll technical employees"). In addition, it is clear from Board Exhibit 2 that the 1199C Service unit at TUH encompasses some technical employees. *See* JA152-53, ¶5 (describing workers in the 1199C "Service" unit as including "certain techs and attendants (anesthesia, catering, central sterile, etc.)"). Moreover, the Union conceded at the hearing that TAP is non-conforming, and the DDE was also premised on the finding that this was a non-conforming unit. *See* JA65 at 24; DDE at 16 [JA28] ("Petitioner seeks to add these two classifications to the existing non-conforming unit."). The Board's finding is thus contrary to the record evidence.

2. TAP Is Not Exempt from the Health Care Rule as an Existing Non-Conforming Unit.

Nor is the Board's contention that TAP qualifies as an "existing non-conforming unit" under § 103.30(a) supported by the record. *See* DRO at 4 [JA49] (claiming the 2006 PLRB certification is "for a bargaining unit that was originally certified in 1975 (albeit with a different collective-bargaining representative)"). In fact, the TAP unit covered by the 2006 certification to which the Board erroneously granted comity differs in material ways from the 1975 Unit.

In addition to being represented by 1199C, the 1975 Unit covered certain technical and professional employees at TU, which included TUH as an unincorporated subdivision of TU. *See In re Employes of Temple Univ. Health Sys.*, 2006 PA PED LEXIS 69, *4, *10. TAP not only has a different collective-bargaining representative than the 1975 Unit, but it also involves a different employer and overall scope because the PLRB determined TU and TUH were separate employers for collective bargaining purposes and split the unit. *See id.* at *5-6; *see also* JA154 (describing 1199C's professional/technical unit at TU); JA1198-1201 (PLRB's Nisi Order of Certification for the TAP unit). The scope of the TAP unit has also changed since 2006, including the addition of four classifications at PASNAP's request in 2014. *See* JA156-57 (listing unit clarification petitions involving PASNAP since 2005); *Temple Univ. Health Sys.*, 2016 PA PED LEXIS 84, *13 (noting four classifications were added to TAP with

TUH's agreement in August 2014). Thus, the finding that TAP was an existing non-conforming unit over which the Board could grant comity is contrary to the record evidence.

B. Extending Comity to TAP Violates Board Precedent.

Under long-standing precedent, the Board could not grant comity to TAP because it is not an existing non-conforming unit and the certification does not comply with the Health Care Rule. Nor, under Board precedent, was the certification valid when it was issued, rendering comity inappropriate.

Assuming arguendo, that the Board is correct that TUH is an employer under the Act, TUH was also an employer within the meaning of the Act when the PLRB ordered an election and certified the TAP unit in 2006 because none of the salient facts regarding TUH's ability to qualify as a political subdivision have changed since that time. If that is the case, the PLRB lacked jurisdiction over TUH when it ordered the election in 2006 and the Board cannot extend comity to the resulting invalid certification under *Summer's Living Systems, Inc.*, 332 N.L.R.B. 275 (2002), which directs that comity should not be granted when a state lacks jurisdiction at the time of the election/certification. *Id.* at 286.

As set forth below, the Board's attempts to distinguish *Summer's Living Systems* in the DRO and justify extending comity to the TAP unit are circular and unavailing. The fact is that the Board has not cited to a single case, and TUH is

aware of none, where the Board has granted comity to a non-conforming unit certified after the Health Care Rule went into effect and there is no justification offered by the Board to depart from its long-standing precedent and grant comity here.

The Board's attempts to distinguish *Summer's Living Systems* from the instant case are contrary to the record and the law. For example, the Board claims *Summer's Living Systems* is different because the Board's jurisdiction was based on a change in Board law, whereas Board jurisdiction over TUH stems from the 1974 Health Care Amendments. DRO at 4 n.7 [JA49] ("[U]nlike the situation in *Summer's Living Systems*, the Board's jurisdiction here does not depend on a change in Board law; rather, the Board has jurisdiction because [TUH] is a nonprofit hospital and the Board has had jurisdiction over nonprofit hospitals since 1974."). The artificial distinction made by the Board misses the point. If, in fact, the Board has jurisdiction over TUH under the Health Care Amendments as it asserts, and which TUH disputes for the reasons noted in Section III below, then the Board had jurisdiction over TUH in 2006 at the time the PLRB issued its certification. If that were the case, the PLRB did not have jurisdiction at the time it issued its certification because jurisdiction by the Board and the PLRB are mutually exclusive. *See* 43 P.S. § 1101.301(1) (excluding employers covered by the NLRA from the definition of "public employer").

The situation here is directly analogous to *Summer's Living Systems* where the Board refused to grant comity to state certifications issued when the state board lacked jurisdiction. Nothing in *Summer's Living Systems* suggests that it applies only to changes in Board policy, as the Board suggests. Rather, it holds state certifications are ineligible for comity when the state lacked jurisdiction at the time of issuance. *See Summer's Living Systems*, 332 N.L.R.B. at 289 (not extending comity to units involving elections "held by the Michigan State agency when it did not have jurisdiction" and noting those certifications "are void for want of jurisdiction at the time of their issuance"). Such a holding aligns with earlier Board cases granting comity to state labor board certifications issued before the effective date of the Health Care Amendments. *See, e.g., Doctors Osteopathic Hosp.*, 242 N.L.R.B. 447, 447, 450 (1979) (extending comity to PLRB certification arising from 1973 election); *St. Joseph's Hosp.*, 221 N.L.R.B. 1253, 1253 (1975) (granting comity only after noting the initial certification of the unit, the filing of the petition, and the hearing all took place before the effective date of the amendments).

Nor is the Board's observation that *Summer's Living Systems* followed a Michigan state court decision finding that *Management Training* preempted the state's jurisdiction relevant. *Summer's Living Systems* focused on the state's jurisdiction under Board law, not under state law. *See* 332 N.L.R.B. at 277 ("We

find the [ALJ] correctly applied the Board's comity policy."). Whether a certification is valid in the eyes of a state has no bearing on whether the Board can grant comity to such a certification. Thus, *Summer's Living Systems* cannot be distinguished and there is no justification to deviate from its precedent.

The Board also cites a 1961 case which it claims stands for the premise that whether it could have asserted jurisdiction previously is irrelevant to its comity analysis. *See* DRO at 4 [JA49] (citing *The West Indian Co., Ltd.*, 129 N.L.R.B. 1203 (1961)). However, this is directly contrary to the later decision in *Summer's Living Systems, Inc.* where the Board explicitly refused to grant comity to certifications issued when the Board, not the state entity, had jurisdiction. The Board cannot have it both ways – it cannot claim both that the PLRB's certification was valid in 2006 and the Board has jurisdiction now when the law and the facts are the same and the only thing that has changed is the Union filing the Petition. As the Board did not suggest that *Summer's Living Systems* is not good law, the Board's decision here to ignore that precedent is contrary to law and must be rejected.

Finally, the Board also failed to consider that extending comity to the TAP unit would be repugnant to the Act because the PLRB-issued election and certification were issued long after the adoption of the Health Care Rule and yet did not conform to the requirements of that regulation. 29 C.F.R. § 103.30(a).

Extending comity would encourage parties to circumvent the Health Care Rule through forum-shopping, as the Union has done here.

Accordingly, the Board has departed from its established precedent and violated the Health Care Rule by extending comity to the TAP unit.

III. TUH IS AN EXEMPT POLITICAL SUBDIVISION NOT COVERED BY THE NLRA.

An employer does not include "any State or political subdivision thereof." 29 U.S.C. §152(2). Under the Board's test, as described in *NLRB v. Natural Gas Utility District of Hawkins County*, the political subdivision exemption applies to entities that are either: (1) created directly by the state, so as to constitute departments or administrative arms of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. 402 U.S. 600, 604-05 (1971). Among the other factors relied on by the Board in determining whether an entity is a political subdivision are: government control over employees and daily operations; government control over labor relations, employee benefits and human resources; policies that are consistent with those of public employees; the use of government-owned facilities and equipment; the degree of government oversight over budget and finances; and administrative services provided by the government. *Northern Diagnostic Services, Inc.*, G. C. Advice Memo., Case No. 18-CA-60338, 2011 WL 6960025, *4 (2011) (citing

cases). In this context, "government" includes political subdivisions. *See id.* at *5 (applying factors).

The Board has declined to exercise jurisdiction over TU since 1972 based on its "unique relationship" with the Commonwealth, described in the Statement of Case, Section I.A, above. *Temple Univ.*, 194 N.L.R.B. 1160, 1161 (1972). That status has not been brought into question here and TU should be treated as a political subdivision (or the equivalent of a political subdivision), as the Board did.[2] By virtue of its relationship with TU, TUH (considered interchangeable with TUHS for labor relations purposes), is a political subdivision under *Hawkins* and the more recent guidance in *Northern Diagnostic Services, Inc.*, G. C. Advice Memo., Case No. 18-CA-60338, 2011 WL 6960025 (2011).[3] The RD's holding to

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[2] In the DRO, the Board noted that it has never held TU to be an exempt political subdivision, but assumed that TU "could be analogized to an exempt political subdivision" when analyzing whether the Board should decline to exercise jurisdiction. *See* DRO at 2 [JA47]. Notably, while TU did not challenge its status as a political subdivision in 1972, factual developments relevant to *Hawkins* factors have occurred since that time. Several additional laws now recognize TU as a governmental and state-related entity, including the federal Tax Reform Act of 1986, the Pennsylvania Right to Know Law, and the Purely Public Charities Act, and federal courts have recognized TU as a state actor under Section 1983, as noted in the Statement of Case, Section I.A, *supra*.

[3] The parties stipulated in the Representation Case that TUHS and TUH are interchangeable for purposes of collective bargaining. JA1175, ¶23. Therefore, references to TUHS and TUH should be viewed as pertaining to the same entity for purposes of determining whether TUHS/TUH—the entity that controls the labor relations functions of the petitioned-for employees—is a political subdivision.

the contrary, affirmd by the Board, is contrary to the law and the record and should be overturned.[4]

In *Northern Diagnostic*, the Board found a private subsidiary (Northern Diagnostic) of a subsidiary (Medical Center) of an entity that is a political subdivision (the Commission) was also a political subdivision under the second prong of *Hawkins* by virtue of the corporate relationship between the three entities. In reaching that conclusion, the Board relied on a number of factors from *Hawkins* that are also present here and which warrant the same conclusion that TUH is a political subdivision under the Act, yet were improperly disregarded by the RD. A key finding in *Northern Diagnostic* was that the Commission, itself a political subdivision, exercised ultimate control over the company, such that Northern Diagnostic was administered by individuals with direct accountability to public officials. *Northern Diagnostic*, 2011 WL 6960025, at *5. As the Board explained:

> The evidence . . . demonstrates that Northern Diagnostic is a second prong political subdivision. First, the Commission, pursuant to its authority to operate the Medical Center, created Northern Diagnostic as a spinoff of the Medical Center, and it was the Commission that authorized the Medical Center to become the 100% stockholder of Northern Diagnostic. Thus, by virtue of its control over the Medical Center, the lone Northern Diagnostic stockholder, the Commission exercises ultimate control over Northern Diagnostic . . . Therefore,

[4] The Board's interpretation of *Hawkins* set forth in *Northern Diagnostic* is more recent than its decision in *Management Training*, 317 N.L.R.B. 1355 (1995), and involves a more closely analogous factual situation to the instant case.

> Northern Diagnostic is administered by individuals with direct accountability to public officials.

Id.

Here, TUHS and TUH exist to carry out a portion of TU's mission, which is to provide education to residents of the Commonwealth. *See* 24 P.S. § 2510-2. TUH became part of TU in 1910 with a primary purpose "to support [TU] and its Health Sciences Center academic programs by providing the clinical environment and service to support the highest quality teaching and training programs for health care students and professionals, and to support the highest quality research programs." JA1263. TU created TUHS in 1995 to hold its health care assets, including TUH, and to further its mission of providing higher education to Commonwealth residents. JA79-80 at 77, 80-82; JA1360-61, ¶3.

While acknowledging TU's corporate control over its subsidiaries TUHS and TUH, the RD found it dispositive that this authority was not statutorily created. DDE at 14 [JA26]. This finding fails to account for the practical significance of that authority, which ultimately belongs to an exempt entity (TU), as well as other aspects of the corporate structure that weigh strongly in favor of treating TUH as a political subdivision. For example, the evidence shows that TU controls TUHS as its sole member; in other words, TUHS is wholly owned by TU. JA79 at 77-78. TU created TUHS's bylaws and reserved significant powers that limit the ability of TUHS to take certain actions, including changing the number of directors on the

board, selling assets, and entering into management contracts, without the express approval of TU. JA1283. In addition, the TU board of trustees, which includes a controlling number of trustees that are statutorily appointed by the Commonwealth, controls the board of TUHS; it is the sole entity with power to appoint directors to, and remove directors from, TUHS's board; and it has the power to dissolve the board altogether.[5] JA1284-86. TU also has authority to call meetings of the TUHS board. JA82 at 91. TU, TUHS, and TUH have interlocking boards with leadership of TU, including its president and the chair of its board, serving on the boards of TUHS and TU.[6] JA1292; JA82 at 90-92. Moreover, like the medical center in *Northern Diagnostic*, TUHS is the sole member of TUH, has the authority to appoint and remove TUH board of directors, and reserves similar powers that TU does over TUHS. JA83 at 93-94; JA1365-68.

In addition to TUH's similarity to these major factors in *Northern Diagnostic*, substantial evidence in the record demonstrates that the relationship between TU, TUHS, and TUH satisfies many of the factors relevant to a political

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[5] The 12 Commonwealth Trustees on the TU board are sufficient to constitute a quorum, giving Commonwealth appointees the ability to exercise control.

[6] A majority of the TUHS board is comprised of TU trustees. *See* JA1542; JA1543-45. In fact, the chair and the vice chair of the TUHS board must come from the TU board of trustees. JA1292.

subdivision analysis under *Northern Diagnostic* and *Hawkins* enumerated above including the following:

1. Overlap of Personnel

- There is significant overlap between TU, TUHS, and TUH at the leadership level. JA78 at 74; JA84 at 98. For example, Larry Kaiser, the CEO of TUHS is, in fact, an employee of TU who also serves as the Senior Executive Vice President of Health Affairs and Dean of TUSM. JA82 at 92; JA1736 (Kaiser is TU's most highly compensated employee). The same is true of Verdi DiSesa, the COO of TUHS, to whom the operational leadership of TUHS and the CEO of TUH reports, as well as other leaders of TUHS to whom the leadership of TUH reports. JA85-86 at 103-05.

- There is also overlap between TU, TUHS, and TUH at the employee level. Significantly, the doctors who provide care at TUH, who are integral to the services that it provides, and are, in fact, the reason an acute care hospital like TUH can function, are employees of TU, not TUH. JA1173, ¶18.

- Employees of TU, TUH and TUHS work side-by-side on a daily basis at TUH, TUP and TPI across a variety of positions.[7] JA1168-69, ¶3; JA1173, ¶18. This includes medical personnel and others, including maintenance and finance and non-employee contracts administration, as TU employees are responsible for maintenance of TUH facilities and management of infrastructure projects. JA1173, ¶18.

- As a result of these day-to-day interactions, employees of one entity may take direction from employees of another. JA1173, ¶18. For example, physicians who practice at TUH, but who are employed by TU, routinely direct the work of TUH employees in a variety of areas including maternity, cancer center, cardiac catheterization lab, emergency department, radiology and many others. *Id.*

- When incidents that could lead to discipline arise, they are reported to management of the employee to take appropriate disciplinary action, which can include discharge. JA1173-74, ¶18. For example, physicians who are employed by TU may direct TUH to dismiss a resident

[7] TUP are the medical practice facilities owned by TU. TPI is a subsidiary of TUHS in which many physicians who are employed by TU provide outpatient medical services. JA1169, ¶4. Many of the physicians who provide services through TPI also practice at TUP facilities. *Id.*; JA86 at 105-06.

employed by TUH who is not satisfying the criteria of the program. JA1173, ¶18. TU Program Directors manage each residency program and are responsible for supervising and evaluating all residents within their programs. *Id.* Included in that function is determining whether a resident will be disciplined, matriculate to the next training level, successfully complete the program, or be removed from the program. *Id.*

- Physicians who are employed by TU also may (and do) report unsafe practice by nurses or other employees of TUH which, if confirmed, may lead to the termination of those TUH employees. JA1173-74, ¶18.

2. Use of Government- and Political Subdivision-Owned Facilities

- TU and the Commonwealth each own a portion of the parcels that make up TUH. JA1176, ¶31.

- For purposes of the jurisdiction of the TU police force under Pennsylvania law, 71 P.S. § 646 *et seq.*, TU's campus is defined to include facilities of TUHS. Because TUHS facilities are considered part of TU's campus, TU is required to report crimes that occur within the vicinity of TUHS facilities, including TUH buildings, on its campus crime log under the federal Clery Act. JA1175, ¶22; JA1195-96.

3. Government Reporting

- By law, TU must report information on the salary and benefits of its employees to the Commonwealth. That includes employees who spend their days working at TUH and TUHS. In addition to the leadership of TUHS who are TU employees, discussed above, skilled maintenance work at TUH is performed by TU employees who are represented by a different union under a collective bargaining agreement that applies solely to work performed at TU's Health Science Campus, which includes TUH, TUSM and other TU medical-related facilities. JA154; JA88-89 at 115-18; JA1173, ¶18.

4. Shared Services and Infrastructure with Political Subdivision

- Legal services between TU and TUHS "essentially function as one office with two locations." JA84 at 98. For example, the General Counsel of TUHS is counsel to TUSM while TU's Office of University Counsel provides representation to TUHS on certain matters. The General Counsel of TUHS has a dual reporting relationship to the CEO of TUHS—a TU employee—and to TU University Counsel, also a TU employee. JA78 at 74; JA84 at 98; JA1388.

- TUH has no separate legal and labor relations functions, relying on TUHS for labor relations and TUHS and TU for legal representation. JA83-84 at 96-99; JA1175, ¶23.

- Negotiators for TU and TUHS confer regarding matters of collective bargaining and contract administration when needed. JA1174, ¶21.

- TU manages and supports TUHS's (including TUH) network over which TUHS information is transmitted. For example, if TUHS has difficulties with its network performance (e.g., network is slow, network connections fail between users and their systems/data) TU network services diagnose and resolve the issue to restore access and connectivity. JA1176, ¶36. TU provides TUHS's external internet connectivity. *Id.* TU manages and supports TUHS's primary and back up data centers including providing physical security and environmental systems like HVAC, electrical, etc. Both data centers are located on the TU campus. *Id.*

- TUH employees have email addresses that are @tuhs.temple.edu. JA1176, ¶35. TU employees have email addresses that are @temple.edu. *Id.* Individuals with dual responsibilities at TU and TUHS/TUH may have both e-mail addresses – @temple.edu and @tuhs.temple.edu. *Id.*

For example, Beth Koob, Chief Counsel and Corporate Secretary of TUHS, has a TUHS and TU email address. *Id.*

- As a result of these intertwined services and personnel, TU, TUHS, and TUH all make allocations of funds to each other annually. These services are not billed on a fee-for-service basis and the resulting allocations total more than a hundred million dollars annually. JA84 at 98-99; JA97 at 149; JA1330.

5. Financial Reporting

- TU prepares consolidated financial statements that include the revenues and expenses of TUHS, TUH, and the other facilities within TUHS. JA1389-1420.

- The TUHS budget must be approved annually by TU's Board of Trustees. JA1283-85 at § 5.4. Similarly, the TUH budget must be approved annually by TUHS' board. JA1365-66 at § 5.4.

6. Interrelationship Regarding Determination of Wages and Benefits

- The wages, pay scales and benefits of the petitioned-for employees, as well as other non-represented employees of TUH, are developed by the Chief Human Resources Officer of TUHS, John Lasky, in consultation with the CFO and Sr. Vice President of TUHS, Robert Lux, with

suggestions from the leadership of TUH. JA1171, ¶14. They are approved by TUHS under the direction of Kaiser, CEO of TUHS. *Id.* These personnel costs are included in the budget of TUHS that must be approved annually by the Board of Trustees of TU. *Id.*

- Kaiser, CEO of TUHS but employed by TU, provides approval of contract terms offered for employees of TUH and TUHS during collective bargaining, consistent with the approval provided for wages and benefits of non-represented employees based on the control that TUHS exercises over the operations of TUH by virtue of TUHS' control over TUH's board, TUH's budget and TUH's labor relations and human resources functions. JA1174, ¶20.

- The Board of Directors of TUHS is consulted regarding collective bargaining terms for TUH employees. JA1174, ¶20. For example, the TUHS board was not only consulted but formed a labor sub-committee in 2009-2010 to review the negotiations and related matters around the PASNAP contracts with TAP and TUHNA, the nurses' unit at TUH represented by PASNAP, when the negotiations turned protracted and contentious leading up to a 30 day strike in Spring 2010. *Id.*

- Economic terms for labor negotiations for TUH and TUHS contracts must be consistent with budget parameters which are approved by TUHS and, ultimately, by TU through approval of the TUHS budget. JA1174, ¶20.

Based on these factors, TUH is far more intertwined with TU than Northern Diagnostic was with the Medical Center and Commission. In fact, the Board in *Northern Diagnostic* found that Northern Diagnostic was still a political subdivision notwithstanding the fact that it ***did not*** meet all of the *Hawkins* criteria and despite the presence of the following facts which weighed against an exempt finding: it had its own balance sheet; carried its own insurance policies; filed its own tax returns; was not tax exempt; and its employees had "their own wage scale, separate and distinct from the Medical Center." *Northern Diagnostic*, 2011 WL 6960025 at *6.

With regard to several of these factors, the relationship between TU, TUHS and TUH presents a stronger political subdivision case. For example, TU purchases general liability insurance that covers TUHS and TUH. Professional liability insurance is maintained as a single insurance program of TUHS and TU covering TUH. TU physicians are covered in part by TU and in part by TUH. JA1176, ¶34. Unlike *Northern Diagnostic*, TUHS issues tax exempt bonds to finance improvements at TUHS facilities, including TUH. JA1176, ¶32. TUHS

has in excess of $500 million in outstanding debt for which TUH and certain subsidiaries of TUHS are obligated. *Id.* As of the time of the hearing, the most recent bond issue by TUHS occurred in 2012 in the amount of approximately $120 million to finance the acquisition of what is commonly referred to as Fox Chase Cancer Center and various information technology improvements. *Id.* In connection with the issuance of these bonds, TUHS is required to submit audited financial statements which include TUH. *Id.* TUHS and TU also have certain joint pension and post-retirement health benefit plans with assets totaling more than $450 million. JA1337-38. Employees of TUH/TUHS receive tuition benefits at TU. JA1171-72, ¶15.

Finally, courts have treated TUH as a state actor under federal law, just as they do TU. *See, e.g.*, *Jones v. Temple Univ.*, No. 14-3390, 2015 WL 4759669 (3d Cir. Aug. 13, 2015) (explaining, in the context of an employee termination, that TUH is part of TU which is undisputedly a state entity which acts under color of state law); *Fantazzi v. Temple Univ. Hosp.*, 2003 WL 23167247 (E.D. Pa. April 11, 2003) (holding that state action was implicated by a Section 1983 claim against TUH and citing a 2000 Third Circuit decision involving the University of Pittsburgh, which in turn cited *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984) and *Molthan v. Temple Univ.*, 778 F.2d 955, 960 (3d Cir. 1985)).

Based on all of these undisputed facts, TUH is not an employer under Section 2(2) of the Act. The Board's affirmance of the RD's findings to the contrary are against the substantial evidence on the record as a whole and warrant reversal by this Court.

IV. THE BOARD ACTED ARBITRARILY IN REFUSING TO DECLINE JURISDICTION OVER TUH.

The Board may decline jurisdiction where asserting jurisdiction would not effectuate the policies of the Act. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951) (even when the Board has statutory authority to act, "the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case"); *see, e.g.*, *Northwestern Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, *3 (2015); *Temple Univ.*, 194 N.L.R.B. 1160, 1161 (1972). This discretionary jurisdiction is distinct from the Board's discretion under Section 14(c)(1) of the Act to "decline to assert jurisdiction over any labor dispute involving any class or category of employers" that has an insufficiently substantial effect on commerce. *See Northwestern Univ.*, 362 N.L.R.B. No. 167, 2015 WL 4882656, at *6 n.28 (describing both); *see also Pennsylvania Virtual Charter Sch.*, 364 N.L.R.B. No. 87, 2016 WL 4524109, *16 n.13 (2016) (Member Miscimarra, dissenting) ("It has never been questioned that the Board has the separate authority to decline to exercise jurisdiction in particular cases when exercising jurisdiction would not effectuate the policies of the Act.").

Here, the Board's refusal to decline jurisdiction over TUH is an arbitrary departure from its longstanding recognition that Board jurisdiction should not apply to TU, an entity in which TUH was an unincorporated division for over 80 years and with which it still maintains very close ties. As described in Section III, *supra*, TU, TUHS, and TUH are functionally and operationally intertwined with one another such that there is no rational basis to treat TUH/TUHS differently from TU for the purposes of exercising Board jurisdiction. The Board's conclusory finding that asserting jurisdiction effectuates the objective of "encourag[ing] the practice and procedure of collective bargaining to the greatest extent possible in order to minimize industrial strife" is an insufficient explanation for why the Board should treat TUH differently and exercise jurisdiction in this case given the many thriving bargaining units that already exist at TUH/TUHS under PERA. *See* DRO at 2, n.3 [JA47] (citing *Management Training*, 317 N.L.R.B. at 1359); JA152-54, ¶5 (listing bargaining units).

Asserting jurisdiction over TUH will only serve to disrupt those existing bargaining relationships and will therefore substantially prejudice TUH. The case cited by the Board for the proposition that the Board has repeatedly asserted jurisdiction over units certified by the PLRB does not address this concern. *See MCAR, Inc.*, 333 N.L.R.B. 1098 (2001). In *MCAR*, the Board asserted federal jurisdiction over an employer despite the long-standing stable bargaining

relationships that had developed between the parties under state law. However, the Board's decision to extend federal jurisdiction there only impacted two bargaining units and both were parties in that case. *Id.* at 1107 n.12. Here, by contrast, the Board has extended jurisdiction over approximately 3,450 unionized employees at TUH and TUHS spanning 11 different bargaining units, 10 of which were not party to the proceedings. *See* JA152-54, ¶5. For decades, all aspects of the bargaining relationships between TUH/TUHS and their unions have been based on operating under Pennsylvania law and the balance associated with PERA. Switching to federal jurisdiction will inherently disrupt these relationships because PERA has traditionally governed issues like what subjects are included in the collective bargaining agreements, what notice is required for bargaining, what notice is given for a strike, what happens at impasse, what meet-and-discuss obligations apply to various managerial rights and changes to terms and conditions, and what economic weapons are available to each side. The disruptive effect of switching to federal jurisdiction will be magnified 10-fold based on the number of bargaining units involved. The Board also ignored that asserting jurisdiction over TUH risks bringing into question the represented status of currently unionized employees in these other bargaining units as explained in Section II, above. *See Summer's Living Sys., Inc.*, 332 N.L.R.B. 275 (2000).

Nor does the Board majority acknowledge a key fact raised by then-Chairman Miscimarra's dissent: TUH consistently offered to add the petitioned-for employees to TAP under the PLRB's procedures. Given the PLRB procedures that were readily available for the Union to add these classifications to TAP, the Board's extension of jurisdiction in this case was arbitrary and served no purpose under the Act.

Finally, the Board ignored that the sole and admitted purpose of the Petition was to violate the First Amendment rights of covered employees by circumventing the anticipated Supreme Court decision on compulsory union fees. Accordingly, the exercise of jurisdiction was arbitrary and should be reversed.

CONCLUSION

For the foregoing reasons, TUH did not commit an unfair labor practice by refusing to bargain with the Union under the NLRA. This Court should therefore grant TUH's petition for review, deny the Board's cross-application for enforcement of the Final Order, and vacate the Board's Final Order.

Dated: January 9, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), as counted by Microsoft Word 2010.

I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced, 14-point, Times New Roman typeface using a Microsoft Word 2010 word processing program.

Respectfully submitted,

/s/ Shannon D. Farmer
Shannon D. Farmer, Esquire

Dated: January 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2019, I electronically filed the foregoing document with the Clerk of the Court for the District of Columbia Circuit by using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

/s/ Shannon D. Farmer
Shannon D. Farmer, Esquire

Dated: January 9, 2019

ADDENDUM TABLE OF CONTENTS

STATUTES

Federal Statutes

State Statutes

REGULATIONS

29 U.S.C. § 152(2)

§ 152. Definitions

***

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 158(a)(1), (a)(5), (g)

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

***

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 160(e), (f)

§ 160. Prevention of unfair labor practices

***

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United

States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 164(c)(1)

§ 164. Construction of provisions

***

(c) Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Pub. L. No. 99-514, 100 Stat. 2602, 2699

§ 1317(24). TAX-EXEMPT STATUS OF BONDS OF CERTAIN EDUCATIONAL ORGANIZATIONS. —

***

(B) QUALIFIED EDUCATIONAL ORGANIZATION. — For purposes of subparagraph (A), the term "qualified educational organization" means a college or university —

(i) which was reincorporated and renewed with perpetual existence as a corporation by specific act of the legislature of the State within which such college or university is located on March 19, 1913, or

(ii) which —

(I) was initially incorporated or created on February 28, 1787, on April 29, 1854, or on May 14, 1888, and

(II) as an instrumentality of the State, serves as a "State–related" university by a specific act of the legislature of the State within which such college or university is located.

10 P.S. § 374

§ 374. State-related universities

(a) General rule.--It is the intent of the General Assembly to recognize that the State-related universities provide a direct public benefit and serve the public purposes of this Commonwealth by declaring the real property of State-related universities to be public property for purposes of exemption from State and local taxation when the property is actually and regularly used for public purposes, provided that nothing in this section is intended or shall be construed to affect the title to real property of State-related universities or the power and authority of the governing bodies of State-related universities with respect to such real property. Further, nothing in this section is intended or shall be construed to affect, impair or terminate any contract or agreement in effect on or before the effective date of this section by and between a State-related university and any political subdivision wherein the State-related university pays real estate taxes, amounts in lieu of real estate taxes or other charges, fees or contributions for government services.

(b) Real property.--All real property owned by State-related universities or owned by the Commonwealth and used by a State-related university is and shall be deemed public property for purposes of the Constitution of Pennsylvania and the laws of this Commonwealth relating to the assessment, taxation and exemption of real estate and shall be exempt from all State and local taxation when actually and regularly used for public purposes.

(c) Exception.--This section shall not include the property of a State-related university the possession and control of which has been transferred to a for-profit entity not otherwise entitled to tax-exempt status, irrespective of whether that entity is affiliated with the university. The execution of a management services contract with a third party entity to provide operational services to the university which would otherwise be provided or conducted directly by the university shall not, however, be considered a transfer of possession and control of real property within the meaning of this section.

(d) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

“Public purposes.” All activities relating to the educational mission of State-related universities, including teaching, research, service and activities incident or ancillary thereto which provide services to or for students, employees or the public.

"State-related universities." The Pennsylvania State University and its affiliate, the Pennsylvania College of Technology, the University of Pittsburgh, Temple University and its subsidiaries Temple University Hospital, Inc., and Temple University Children's Hospital, Inc., and Lincoln University.

24 P.S. § 20-2001-D

§ 20-2001-D. Definitions

The following words and phrases when used in this article shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"**Academic and administrative support units.**" Any organizational entity, as defined in the organizational manual of the university, that reports directly to the president of the university, chief academic officer or vice president, including the office of the president, chief academic officer and vice president.

"**Department.**" The Department of Education of the Commonwealth.

"**Expenditures.**" Disbursements or payments of State appropriations, tuition and fees supporting operational, educational or other general categories of expenses as defined in: the generally accepted accounting principles as prescribed by the National Association of College and University Business Officers, the American Institute of Certified Public Accountants, or by their successors, or by any other recognized authoritative body; the "Commonwealth of Pennsylvania Budget Instructions for the State System of Higher Education, State-Related Universities and Non-State-Related Colleges and Universities"; and the financial reporting policies and standards promulgated by the Commonwealth of Pennsylvania and by the Federal Government that apply to The Pennsylvania State University.

"**Revenue.**" All State appropriations, tuition and fees.

"**State-related institution.**" The Pennsylvania State University, the University of Pittsburgh, Temple University, Lincoln University and their branch campuses.

24 P.S. § 20-2002-D

§ 20-2002-D. Reporting guidelines

In any year a State-related institution receives a nonpreferred appropriation, a report shall be submitted in electronic format to the department and the Joint State Government Commission and shall include data for all programs. The report, to be submitted prior to September 1, shall cover the 12-month period beginning with the summer term of the preceding year and shall include:

(1) The following counts and distributions for each term during the period:

(i) The definitions and numbers of faculty members employed full time, of faculty members employed part time, of full-time students enrolled in graduate courses, of full-time students enrolled in undergraduate courses, of part-time students enrolled in graduate courses and of part-time students enrolled in undergraduate courses.

(ii) The total numbers of undergraduate student credit hours, divided into lower division and upper division course levels, and of graduate student credit hours, divided into three course levels: master's, first professional and doctoral.

(iii) The number of different courses scheduled by level of instruction and the number of sections of individual instruction scheduled by level of instruction, each further subdivided by two-digit Classification of Instructional Program (CIP) categories of instructional programs of higher education as defined by the National Center for Education Statistics, United States Department of Education.

(iv) The number of terms scheduled and the dates thereof.

(2) For the summer term and the following academic year in total and for each two-digit CIP program category, a classification of faculty members or other professional employees by title, including: professor, associate professor, assistant professor, instructor, lecturer, research associate, librarian and academic administrator; faculty members or other professional employees under each title to be subdivided by type of assignment: teaching and nonteaching; and each such set of faculty members or other professional employees to be further subdivided by type of employment: full-time or part-time; and the following aggregates for each such subdivided classification:

(i) The number of faculty and other professional employees and their full-time equivalence in instructional and noninstructional functions.

(ii) The sum of credits assigned to undergraduate classroom courses and the sum of credits assigned to graduate classroom courses taught, divided into lower division, upper division, master's, first professional and doctoral course levels.

(iii) The sum of credits assigned to undergraduate individual instruction courses and the sum of credits assigned to graduate individual instruction courses taught, divided into lower division, upper division, master's, first professional and doctoral course levels.

(iv) The sum of undergraduate classroom student credit hours and the sum of graduate classroom student credit hours generated, divided into lower division, upper division, master's, first professional and doctoral course levels.

(v) The sum of undergraduate individual instruction student credit hours and the sum of graduate individual instruction student credit hours generated, divided into lower division, upper division, master's, first professional and doctoral course levels.

(vi) The total salary paid for instructional functions and for noninstructional functions and the amount of this salary paid for each of these functions from university funds, Federal funds and other funds.

(3) For each term of the period covered for each faculty member employed full time identified by two-digit CIP program category and title, the report shall contain an analysis of the average hours per week spent in university-related activities, stating specifically hours spent in undergraduate classroom contact and graduate classroom contact, hours spent in preparation, hours spent in research and hours spent in public service.

24 P.S. § 20-2003-D

§ 20-2003-D. Additional report requirements

In addition to the requirements in section 2002-D relative to any appropriation, the report covering the 12-month period shall include for all programs of the university:

(1) Minimum number of credits required for a baccalaureate degree and for a master's degree.

(2) Number of bachelor's degrees, master's degrees, first professional degrees and doctoral degrees awarded for the previous five years and those estimates for that year.

24 P.S. § 20-2004-D

§ 20-2004-D. Disclosure

(a) Expenditures.--The university shall disclose the following:

(1) Revenue and expenditure budgets of the university's academic and administrative support units for the current fiscal year.

(2) The actual revenue and expenditures for the prior year in the same format as the information reported under paragraph (1).

(3) For any defined project or program which is the subject of a specific line item appropriation from the General Fund, the university shall disclose the following:

(i) Revenue and expenditure budgets of the defined program or project for the current fiscal year.

(ii) The actual revenue and expenditures of the defined program or project for the prior year in the same format as the information reported under paragraph (1).

(4) The revenue and expenditures of any auxiliary enterprise which is directly funded in whole or in part by tuition or a State appropriation for the current fiscal year.

(b) Prior fiscal year.--The university shall provide the following additional information for the prior fiscal year for each academic or administrative support unit, for each defined project or program and for any auxiliary enterprise:

(1) The number of employees by academic rank and by classification the number of administrators, staff, clerical and technical service employees.

(2) Median and mean salary by academic rank and by classification the median and mean salaries of administrators, staff, clerical and technical service employees.

(3) Nonsalary compensation as a percentage of salary. Nonsalary compensation shall include, but not be limited to, medical benefits, life insurance benefits, pension benefits, leave benefits, employer Social Security payments and workers' compensation benefits.

(4) A statement of the university's retirement policies.

(5) A policy statement relating to a reduction of tuition for employees' family members.

(6) A list of purchase of service contracts which exceed $1,000 by category of service, including, but not limited to, legal, instructional, management, accounting, architecture, public relations and maintenance. The list shall contain the name and address of the contractor, a statement of the nature of the duties of the contractor and the academic and administrative support unit for which the duties are performed. If a purchase of service contract exceeds 10% of the total aggregate expenditure of the contract category per academic or administrative support unit, then the contracted amount shall also be listed.

(7) A list of purchase of goods contracts which exceed $1,000. The list shall contain the name and address of the contractor and a list of the goods purchased and the academic or administrative support unit for which such goods were contracted. If a purchase of goods contract exceeds 10% of the total aggregate expenditure per academic or administrative support unit, then the contracted amount shall also be listed.

(8) A list by academic or administrative support unit in the aggregate of the expenses of travel, subsistence and lodging, whether provided or reimbursed.

(c) Format.--The university shall submit in electronic format a report of the information under subsections (a) and (b) to the department and the Joint State Government Commission. Each such institution shall maintain a copy of the report in the institution's library and shall submit a copy to each of the four State regional library resource centers.

(d) Time frame.--A university's report required to be submitted under this section shall be submitted within 180 days of the close of the university's current fiscal year.

(e) Minutes.--The university shall make a copy of the minutes of each public meeting of the institution's board of trustees, as well as a copy of the institution's integrated postsecondary education data systems report, available for public inspection in the institution's library.

24 P.S. § 20-2005-D

§ 20-2005-D. Comparative analysis and posting by commission

The Joint State Government Commission shall develop a statistical comparison analysis recognizing differences in missions from the reports made under this article. A majority of the members of the commission may request additional documentation, except for salary or identity of individuals, necessary to complete the comparative analysis. The comparison shall be provided to the Education Committee of the Senate and the Appropriations Committee of the Senate and the Education Committee of the House of Representatives and the Appropriations Committee of the House of Representatives and the four State regional libraries. The comparative analysis shall be posted on the Joint State Government Commission's Internet website for a period of no less than five years from the date of submission.

24 P.S. § 20-2006-D

§ 20-2006-D. Posting of reports by department

The reports required under this article shall be posted on the department's Internet website for a period of no less than five years from the date of submission.

24 P.S. § 2510-1

§ 2510-1. Short title

This act shall be known and may be cited as the "Temple University--Commonwealth Act."

24 P.S. § 2510-2

§ 2510-2. Legislative findings; declaration of policy

It is hereby determined and declared as a matter of legislative finding:

(1) That the Temple College of Philadelphia was created a corporation with perpetual existence under the laws of the Commonwealth of Pennsylvania under an act of the General Assembly of the Commonwealth of Pennsylvania entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, 1874, and its supplements, and its charter approved by the Court of Common Pleas No. 1 for the County of Philadelphia, of March Term, 1888, No. 346, on the twelfth day of May, 1888;

(2) That the original Charter of Incorporation was amended in the Court of Common Pleas No. 1, for the County of Philadelphia on the eighth day of April, 1891 and on the twelfth day of December, 1907;

(3) That the name of the Temple College of Philadelphia was changed to Temple University by amendment of the original Charter of Incorporation on the twelfth of December, 1907;

(4) That the original Charter of Incorporation was amended by merging and consolidating "The Samaritan Hospital" and "The Garretson Hospital" into and with Temple University on the twenty-first day of January, 1910, and merging the "Pennsylvania School of Horticulture for Women" with Temple University on the sixteenth day of June, 1958;

(5) That the Northwestern General Hospital of Philadelphia was merged into Temple University on the twenty-seventh of February, 1964, and the Northern Dispensary of Philadelphia was merged into Temple University on the twenty-ninth of July, 1964;

(6) That Temple University owns and maintains land, buildings, and other facilities which are used, together with land and buildings owned by the Commonwealth of Pennsylvania, for higher education, which land, buildings and other facilities are under the entire control and management of the board of trustees;

(7) That the Commonwealth of Pennsylvania recognizes Temple University as an integral part of a system of higher education in Pennsylvania, and that it is desirable and in the public interest to perpetuate and extend the relationship between the Commonwealth of Pennsylvania and Temple University for the purpose of improving and strengthening higher education by designating Temple University as a State-related university;

Therefore, it is hereby declared to be the purpose of this act to extend Commonwealth opportunities for higher education by establishing Temple University as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.

24 P.S. § 2510-3

§ 2510-3. Change of name

The Charter of Temple University shall be amended by changing the name of Temple University to "Temple University--Of The Commonwealth System of Higher Education," hereinafter referred to as "the University" and, as such, shall continue as a corporation for the same purposes as, and with all rights and privileges heretofore granted to, Temple University, unless hereinafter modified or changed.

24 P.S. § 2510-4

§ 2510-4. Board of trustees; composition; Commonwealth trustees; terms

(a) The Board of Trustees of the University shall consist of thirty-six voting members, together with the Governor of the State, the Superintendent of the Department of Public Instruction, and the Mayor of the City of Philadelphia, all of whom shall be members of the board of trustees, ex officio. The elective and appointive members, except as hereinafter provided, shall serve for four year terms.

(b) Twelve of the trustees shall be designated Commonwealth trustees and four shall be appointed by the Governor, with the advice and consent of two-thirds of all of the members of the Senate, four by the President pro tempore of the Senate, and four by the Speaker of the House of Representatives. Three appointments shall be made by each of the appointing authorities for a term of four years, three for a term of three years, three for a term of two years, and three for a term of one year commencing in October, 1965, and annually thereafter, three appointments shall be made by each of the three Commonwealth appointing authorities for a term of four years.

(c) Within six months after the effective date of this act the by-laws shall be amended to provide for twenty-four trustees, in addition to the twelve Commonwealth trustees, and to establish a procedure whereby annually six of such trustees will be elected for four year terms.

24 P.S. § 2510-5

§ 2510-5. Powers and duties of board of trustees

The entire management, control and conduct of the instructional, administrative, and financial affairs of the university is hereby vested in the board of trustees. The board may exercise all the powers and franchises of the university and make by-laws for their own government, as well as for the university.

24 P.S. § 2510-6

§ 2510-6. Public support, tuition

The university shall maintain such tuition and fee schedules for Pennsylvania resident and non-Pennsylvania resident full-time students as are set forth annually in the act of the General Assembly which makes appropriations to Temple University: Provided, That the amounts appropriated by said act are sufficient for the maintenance of such schedules by the university: And, provided further, That for any given year, in the event the amounts appropriated are not sufficient for the maintenance of said tuition and fee schedules, the university shall have the right to alter said schedules to the extent necessary to provide required income equal to the amount not provided by the appropriation act.

24 P.S. § 2510-7

§ 2510-7. Capital improvements

The benefits of all Commonwealth or Commonwealth authority programs for capital development and improvement shall be available to the university under terms and conditions comparable to those applicable to land grant institutions of higher learning and State colleges. In accordance with legislative appropriations made as provided by law, the Commonwealth may, by agreement with the board of trustees, acquire lands, erect and equip buildings, and provide facilities for the use of the university.

24 P.S. § 2510-8

§ 2510-8. Appropriations

(a) The sums appropriated by the Commonwealth shall be paid to the board of trustees only upon presentation by them of certified payrolls and vouchers showing expenditures in accordance with the appropriations. The Auditor General shall draw a warrant upon the State Treasurer for payment of approved expenditures. All expenditures made by the board of trustees in respect to such appropriations shall be subject to a post-audit by the Auditor General.

(b) For the purpose of assuring the proper accountability on the part of Temple University for the expenditure of the amounts appropriated by the Commonwealth, Temple University shall establish a Commonwealth Appropriation Account into which only the amounts appropriated by the Commonwealth shall be credited when received. Temple University shall apply the moneys in the Commonwealth Appropriation Account only for such purposes as are permitted in the act appropriating the same and shall at all times maintain proper records showing the application of such moneys. Not later than sixty days after the close of the fiscal year to which the specific appropriation relates, Temple University shall file with the General Assembly and with the Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from both the Commonwealth Appropriation Account and other university accounts during said fiscal year. Such statement of expenditures shall be reviewed by the Auditor General of the Commonwealth, and he shall have the right, in respect to the Commonwealth Appropriation Account, to audit and disallow expenditures made for purposes not permitted by the appropriation act and to cause such sums to be recovered and paid by Temple University to the Treasurer of the

Commonwealth. In respect to expenditures made by the university from accounts other than the Commonwealth Appropriation Account, the Auditor General shall have the right to review only and he shall file annually with the General Assembly such information concerning said expenditures as the General Assembly or any of its committees may require.

24 P.S. § 2510-9

§ 2510-9. Issuance of bonds tax exempt within the Commonwealth

(a) The board of trustees may provide for the issuance of bonds in the name of the university for any proper purpose in the same manner as heretofore.

(b) The university shall have no power at any time or in any manner to pledge the credit or the taxing power of the Commonwealth of Pennsylvania or any political subdivision nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal of or interest on such obligations.

(c) Bonds issued by the university and loans secured by mortgages, their transfer and the income therefrom, (including any profits made on the sale thereof) shall at all times be free from taxation within the Commonwealth of Pennsylvania.

24 P.S. § 2510-10

§ 2510-10. Reports

The President of the university shall each year, not later than the first day of October, make a report of all the activities of the university, instructional, administrative and financial, for the preceding scholastic and fiscal year, to the board of trustees, who shall transmit the same to the Governor and to the members of the General Assembly.

24 P.S. § 2510-11

§ 2510-11. Exemption

The act of March 15, 1899 (P.L. 8), entitled "An act to regulate the manner in which appropriations to educational, penal, reformatory, charitable, benevolent, or eleemosynary institutions shall be paid," shall not apply to any appropriation made in pursuance of this act.

24 P.S. § 2510-12

§ 2510-12. Effective date

This act shall take effect July 1, 1965.

35 P.S. § 7210.105(b)

§ 7210.105. Department of Labor and Industry.

***

(b) State-owned buildings.--

(1) The department shall maintain plan and specification review and inspection authority over all State-owned buildings. State-owned buildings shall be subject to regulations promulgated under this act. The department shall notify municipalities of all inspections of State-owned buildings and give municipalities the opportunity to observe the department inspection of such buildings.

(2) Municipalities shall notify the department of all inspection of buildings owned by political subdivisions and give the department the opportunity to observe municipal inspection of such buildings.

(3) The department shall make available to municipalities, upon request, copies of all building plans and plan review documents in the custody of the department for State-owned buildings.

(4) A municipality shall make available to the department, upon request, copies of all building plans and plan review documents in the custody of the municipality for buildings owned by political subdivisions.

43 P.S. § 1101.301(1)

§ 1101.301. Definitions

As used in this act:

(1) "Public employer" means the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal governments but shall not include employers covered or presently subject to coverage under the act of June 1, 1937 (P.L. 1168), as amended, known as the "Pennsylvania Labor Relations Act," the act of July 5, 1935, Public Law 198, 74th Congress, as amended, known as the "National Labor Relations Act."

65 P.S. § 67.1501

§ 67.1501. Definition

As used in this chapter, “State-related institution” means any of the following:

(1) Temple University.

(2) The University of Pittsburgh.

(3) The Pennsylvania State University.

(4) Lincoln University.

65 P.S. § 67.1502

§ 67.1502. Reporting

No later than May 30 of each year, a State-related institution shall file with the Governor's Office, the General Assembly, the Auditor General and the State Library the information set forth in section 1503.

65 P.S. § 67.1503

§ 67.1503. Contents of Report

The report required under section 15021 shall include the following:

(1) Except as provided in paragraph (4), all information required by Form 990 or an equivalent form of the United States Department of the Treasury, Internal Revenue Service, entitled the Return of Organization Exempt From Income Tax, regardless of whether the State-related institution is required to file the form by the Federal Government.

(2) The salaries of all officers and directors of the State-related institution.

(3) The highest 25 salaries paid to employees of the institution that are not included under paragraph (2).

(4) The report shall not include information relating to individual donors.

65 P.S. § 67.1504

§ 67.1504. Copies and posting

A State-related institution shall maintain, for at least seven years, a copy of the report in the institution's library and shall provide free access to the report on the institution's Internet website.

71 P.S. § 646

§ 646. Capital Police, Commonwealth Property Police and Campus Police

The Capitol Police, Commonwealth Property Police and the Security or Campus Police of all State colleges and universities, State aided or related colleges and universities and community colleges shall have the power, and their duty shall be:

(a) To enforce good order in State buildings and on State grounds in Dauphin County, in the Pittsburgh State Office Building and the grounds, in the Philadelphia State Office Building and the grounds and in the grounds and buildings of all State colleges and universities, State aided or related colleges and universities and community colleges;

(b) To protect the property of the Commonwealth in State grounds and buildings in Dauphin County, in the Pittsburgh State Office Building and grounds, in the Philadelphia State Office Building and grounds and in the grounds and buildings of all State colleges and universities, State aided or related colleges and universities and community colleges;

(c) To exclude all disorderly persons from the premises of the State Capitol, State buildings in Dauphin County, the Pittsburgh State Office Building and the Philadelphia State Office Building and from the grounds and buildings of all State colleges and universities, State aided or related colleges and universities and community colleges;

(d) In the performance of their duties to adopt whatever means may be necessary;

(e) To exercise the same powers as are now or may hereafter be exercised under authority of law or ordinance by the police of the cities of Harrisburg, Pittsburgh and Philadelphia, municipalities in Dauphin County wherein State buildings are located and in municipalities wherein said colleges, universities and community colleges are located:

(f) Deleted by 1965, Sept. 28, P.L. 553, § 4.

(g) To order off said grounds and out of said buildings all vagrants, loafers, trespassers, and persons under the influence of liquor, and, if necessary, remove them by force, and, in case of resistance, carry such offenders before an alderman, justice of the peace1 or magistrate and

(h) To arrest any person who shall damage, mutilate or destroy the trees, plants, shrubbery, turf, grass-plots, benches, buildings or structures, or commit any other offense within State buildings on State grounds in Dauphin County, the Pittsburgh State Office Building and grounds, and the Philadelphia State Office Building and grounds, the Executive Mansion, and the grounds and buildings of all State colleges and universities, State aided or related colleges and universities and community colleges, and carry the offender before the proper alderman, justice of the peace or magistrate and prefer charges against him under the laws of the Commonwealth.

Security and Campus Police shall exercise their powers and perform their duties only on the premises of the State colleges and universities, State aided or related colleges and universities and community colleges by or for which they are employed and only and after they have completed a course of training including crisis intervention training and riot control as approved by the Department of Education except, that Campus Police employed by State owned colleges and universities located in any municipalities, other than cities of the first class or second class, are authorized, in emergency situations occurring within the municipality, upon the request of the mayor or other executive authority and under the direction of the local law enforcement authorities, to exercise those powers and perform those duties conferred pursuant to this section within the municipality for the limited purpose of aiding local authorities in emergency situations. When so acting, the Campus Police shall be acting within the scope of the authority of this act and are, at all times, State employes of this Commonwealth and entitled to all the rights and benefits accruing therefrom.

71 P.S. § 646.1

§ 646.1. Campus police powers and duties

(a) Campus police shall have the power and their duty shall be:

(1) to enforce good order on the grounds and in the buildings of the college or university;

(2) to protect the grounds and buildings of the college or university;

(3) to exclude all disorderly persons from the grounds and buildings of the college or university;

(4) to adopt whatever means may be necessary for the performance of their duties;

(5) to exercise the same powers as are now or may hereafter be exercised under authority of law or ordinance by the police of the municipalities wherein the college or university is located, including, but not limited to, those powers conferred pursuant to 42 Pa.C.S. Ch. 89 Subch. D (relating to municipal police jurisdiction);

(6) to prevent crime, investigate criminal acts, apprehend, arrest and charge criminal offenders and issue summary citations for acts committed on the grounds and in the buildings of the college or university and carry the offender before the proper alderman, justice of the peace, magistrate or bail commissioner and prefer charges against him under the laws of this Commonwealth. Except when acting pursuant to 42 Pa.C.S. Ch. 89 Subch. D, campus police shall exercise these powers and perform these duties only on the grounds or within 500 yards of the grounds of the college or university. For the purposes of applying the provisions of 42 Pa.C.S. Ch. 89 Subch. D, the grounds and within 500 yards of the grounds of the college or university shall constitute the primary jurisdiction of the campus police;

(7) to order off the grounds and out of the buildings of the college or university all vagrants, loafers, trespassers and persons under the influence of liquor and, if necessary, remove them by force and, in case of resistance, carry such offenders before an alderman, justice of the peace, bail commissioner or magistrate; and

(8) to arrest any person who damages, mutilates or destroys the trees, plants, shrubbery, turf, grass plots, benches, buildings and structures or commits any other offense on the grounds and in the buildings of the college or university and carry the offender before the proper alderman, justice of the peace, bail commissioner or magistrate and prefer charges against him under the laws of this Commonwealth.

(b) Campus police and municipalities are authorized to enter into an agreement with the municipality wherein the college or university is located to exercise concurrently those powers and to perform those duties conferred pursuant to a cooperative police service agreement in accordance with 42 Pa.C.S. § 8953 (relating to Statewide municipal police jurisdiction). When so acting, the campus police of the college or university shall have the same powers, immunities and benefits granted to police officers in 42 Pa.C.S. Ch. 89 Subch. D.

(c) When acting within the scope of the authority of this section, campus police are at all times employes of the college or university and shall be entitled to all of the rights and benefits accruing therefrom.

(d) As used in this section:

“Campus police” means all law enforcement personnel employed by a State-aided or State-related college or university who have successfully completed a campus police course of training approved under 53 Pa.C.S. Ch. 21 Subch. D (relating to municipal police education and training).

“College” or “university” means all State-aided or State-related colleges and universities.

“Grounds” means all lands and buildings owned, controlled, leased or managed by a college or university.

29 C.F.R. § 103.30

§ 103.30. Appropriate bargaining units in the health care industry

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional

directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) Hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) Acute care hospital is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) Psychiatric hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term rehabilitation hospital includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A non-conforming unit is defined as a unit other than those described in paragraphs (a)(1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.

SECONDARY ADDENDUM TABLE OF CONTENTS

STATUTES

Pennsylvania Statute (not published on commercial legal databases)

TEMPLE UNIVERSITY - GENERAL SUPPORT

Act of Jul. 10, 2014, P.L. 3194, No. 13A **Cl. 84**

A Supplement

To the act of November 30, 1965 (P.L.843, No.355), entitled "An act providing for the establishment and operation of Temple University as an instrumentality of the Commonwealth to serve as a State-related university in the higher education system of the Commonwealth; providing for change of name; providing for the composition of the board of trustees; terms of trustees, and the power and duties of such trustees; providing for preference to Pennsylvania residents in tuition; providing for public support and capital improvements; authorizing appropriations in amounts to be fixed annually by the General Assembly; providing for the auditing of accounts of expenditures from said appropriations; authorizing the issuance of bonds exempt from taxation within the Commonwealth; requiring the President to make an annual report of the operations of Temple University," making an appropriation for carrying the same into effect; providing for a basis for payments of such appropriation; and providing a method of accounting for the funds appropriated and for certain fiscal information disclosure.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The following sum, or as much thereof as may be necessary, is hereby appropriated to the Trustees of Temple University for the fiscal year July 1, 2014, to June 30, 2015, for the purposes and in the amount as shown:

For general support $139,917,000

Section 2. Payments to Temple University on account of the appropriation provided in section 1 shall be made on the basis of costs during the fiscal year.

Section 3. (a) Payment to Temple University of the appropriation provided in section 1 shall be made monthly during the fiscal year.

(b) Such monthly payments shall be made in accordance with the provisions of section 2 on the basis of estimated costs. The estimate of costs shall be submitted by Temple University to the Secretary of Education, the General Assembly and the State Treasurer not later than 30 days prior to the date on which such payment is to be made.

Section 4. (a) Temple University shall apply the moneys appropriated by this act only for such purposes as are permitted in this act and shall at all times maintain proper records showing the application of such moneys. Not later than 120 days after the close of the fiscal year to which this act relates, Temple University shall file, with the Secretary of Education, the General Assembly and the Auditor General of the Commonwealth, a statement setting forth the amounts and purposes of all expenditures made from moneys appropriated by this act and other university accounts during said fiscal year, as provided in section 2, used as a basis for receipt of any appropriation during said fiscal year.

(b) Such statement of expenditures and costs shall be reviewed by the Auditor General of the Commonwealth, and he shall have the right, in respect to the moneys appropriated by this act, to audit and disallow expenditures made for purposes not permitted by this act and to cause such sums to be recovered and paid by Temple University to the State Treasurer. In respect to expenditures made by the university from moneys other than those appropriated by this act, the Auditor General shall have the right to review only, and he shall file annually with the General Assembly such information concerning said expenditures as the General Assembly or any of its committees may require.

Section 5. Temple University shall provide full, complete and accurate information as may be required by the Department of Education or the chairman or the minority chairman of the Appropriations Committee of the Senate or the chairman or the minority chairman of the Appropriations Committee of the House of Representatives.

Section 6. Temple University shall present and report its financial statements required under the provisions of this act in accordance with: the generally accepted accounting principles as prescribed by the National Association of College and University Business Officers, the American Institute of Certified Public Accountants, or their successors, or by any other recognized authoritative body; the "Commonwealth of Pennsylvania Budget Instructions for the State System of Higher Education, State-Related Universities and Non-State-Related Colleges and Universities"; and the financial reporting policies and standards promulgated by the Commonwealth of Pennsylvania and by the Federal Government that apply to Temple University.

Section 7. This act shall take effect July 1, 2014, or immediately, whichever is later.